Case No. 91 533

IN THE

SUPREME COURT OF THE

UNITED STATES

October 1991 Term

CHARLES J. ROGERS CONSTRUCTION,

a Michigan Corporation,

Petitioner,

v

TRUSTEES FOR MICHIGAN CARPENTERS

COUNCIL HEALTH AND WELFARE FUND,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE SUPPLEMENTAL QUESTION PRESENTED ON REVIEW

WHETHER THERE IS A CONFLICT IN THE DECISIONS OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CONCERNING THE FEDERAL RULES OF APPELLATE PROCEDURE AND JURISDICTION OF THE PARTIES?

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PRIOR OPINIONS IN THIS CASE

The United States Court of Appeals for the Sixth Circuit decided this case on May 10, 1991 and its opinion is reported in 933 F.2d 376 and was reproduced in the Appendix (1a-62a) to the Petition for a Writ of Certiorari, together with several opinions and orders of the United States District Court for the Western District of Michigan. Since the Court of Appeals decision in this case, the Sixth Circuit Court of Appeals has decided a case, International Union, UAW v United Screw & Bolt Corp., 941 F. 2d 466 (1991), which we believe is contrary to the decision in the case at bar as it relates to what parties were brought before the Court of Appeals by the Notices of Appeal filed in the Court of Appeals by the opposing parties in interest. Had the rule of this

subsequent decision been applied to the case at bar, the result, we believe, would have been a decision with applicability to all interested parties, rather than the two parties specifically mentioned in the captions of both Notices of Appeal. The pertinent portion of this subsequent decision is reproduced in the Appendix to this Supplemental Brief (5b-17b).

CONCISE STATEMENT OF THE CASE

The statement of the case will be limited to the facts and proceedings concerned with the ruling of the Sixth Circuit Court of Appeals as it dealt with its jurisdiction over the parties that contested the matters in the district court.

There were sixteen parties plaintiff and six parties defendant in

the action before the district court. The caption of the Notice of Appeal filed by the parties defendant identified the parties as follows:

MICHIGAN CARPENTERS COUNCIL
HEALTH AND WELFARE FUND, et al.

Plaintiffs,

v

CHARLES J. ROGERS CONSTRUCTION COMPANY, et al.,

Defendants.

Except for the initial pleadings, this was the caption used by the parties and the district court for all pleadings and court orders, opinions and judgments.

The body of the Notice of Appeal filed by the parties defendant stated:

> Notice is hereby given that Defendants, Charles J. Rogers Construction Company, et. al., in the above case no. G83-582 CA5, hereby appeal to the United States

Court of Appeals for the Sixth Circuit from the Opinion and Order RE Motion to Alter and Amend the Judgment filed in this action on February 22, 1989, and the Judgment entered on December 27, 1988.

The Notice of Cross Appeal filed by the parties plaintiff was essentially identical to the Notice of Appeal filed by the parties defendant.

The parties defendant, past the time for filing a Notice of Appeal, moved to amend the caption of the Notice of Appeal. The parties plaintiff also similarly moved to amend the caption of its Notice of Cross Appeal. The Sixth Circuit Court of Appeals denied both of these motions (1 b- 2 b). Motions for reconsideration of this order were made by both contesting interests and these motions were granted and the question of the proper parties to the appeal was

referred to the panel assigned to determine the case on the merits (3b-5b).

The assigned panel ruled that the specificity requirements of Rule 3 (c) and 4 (a) (3) were not met and the only parties to the appeal were Charles J. Rogers Construction Co. and Michigan Carpenters Council Health & Welfare Fund (16a-17a).

Subsequent to filing the Petition for a Writ of Certiorari, counsel for Petitioner discovered a subsequent ruling of the Sixth Cicuit Court of Appeals concerning the jurisdiction of courts of appeal as related to the contents of the Notice of Appeal and the Federal Rules of Appellate Procedure (5b-17b). We believe this ruling is contrary to the jurisdictional ruling made by the Sixth Circuit Court of Appeals in this case and seek to make the issue of that difference a part of the review of this Court.

ARGUMENT

DIFFERING DETERMINATIONS OF THE SIXTH CIRCUIT COURT OF APPEALS CONCERNING THE CONTENT OF NOTICES OF APPEAL AND JURISDICTION OF THAT COURT RAISE AN ISSUE AS TO WHETHER PETITIONER HAS RECEIVED THE EQUAL PROTECTION OF THE LAW.

The determination of the panel of the Sixth Circuit Court of Appeals, in the case at bar, determined that the Notice of Appeal and the Notice of Cross-Appeal, because there was only one appealing party specifically identified in each document, lacked the specificity required by Rules 3 (c) and 4 (a) (3) so that the only parties to the appeal were the single parties identified as appellant parties in the Notice of Appeal and the Notice of Cross Appeal (14a-18a).

In International Union, UAW v United Screw & Bolt, supra, (13b-14b), it was determined that the Sixth Circuit Court of Appeals, pursuant to the Federal Rules of Appellate Procedure, had jurisdiction of all appellee parties, without regard to whether they were specifically identified in the Notice of Appeal. Cf. Streetman v Jordan, 918 F.2d 555 (CA 5 1990); Longmire v Guste, 921 F.2d 620 (CA 5 1991). A significant factor in this determination was that all of the litigants had notice of the full extent of the parties and issues on appeal:

> Notwithstanding United Screw's failure to specifically mention the Local 217 in its Notice of Appeal, both parties were put on notice that the entire judgment that determined their legal rights with respect to each other was being called into question (16b).

There is no question that applying the foregoing reasoning of the panel in International Union, UAW v United Screw & Bolt, supra, to this case would have brought all of the parties and all of the issues of this case before the Sixth Circuit Court of Appeals. All of the parties were appellees to the appeal or cross appeal, and, as it was, the panel in this case determined that all of the issues, save one, were before the court.

> , . . we further find that all issues on appeal are preserved with the exception of the claim that the district court erred in finding that Inc. was the alter ego of Construction and Excavating since Inc. failed to perfect its right to appeal. (17a),

and it would seem that if one facet of an "alter ego" is before the court, the

facet created by state reorganization proceedings to protect creditors should be before the court.

In terms of notice, it is evident that, here, there was no confusion in the parties. They knew that all of the issues of the judgments and orders appealed from were intended to be subject to the rulings of the court of appeals on review. It is only when this time honored criterion to jurisdiction is given no consideration that the parties and issues to this proceeding and the significance of extended trial proceedings became materially reduced; which reduction did not reduce one iota the burden of the court of appeals; rather it added to the burden.

The approach taken by the panel of the Sixth Circuit Court of Appeals in International Union, UAW v United Screw & Bolt Co., supra, has been used by

other courts of appeal in determining its jurisdiction. The Third Circuit, in In re Paoli R. R. Yard PCB Litigation, 916 F.2d 829, 838 (1990) considered notice the basis of jurisdiction, saying:

> Indeed, correspondence from defense counsel confirms that no party was misled by the notice, and that all parties presumed it to include all plaintiffs referenced under the relevant docket numbers.

The Ninth Circuit, in Lockman Foundation v Evangelical Alliance Mission, 930 F2d 764, 772 (1991) considered notice the basis of jurisdiction, saying:

> Where the appellee has argued the merits fully in its brief, it has not been prejudiced by the appellants failure to designate

specifically an order which is subject to appeal.

Similarly, in the Eleventh Circuit, Davis v Locke, 936 F.2d 1208, 1212, (1991) notice has been the basis for appellate jurisdiction:

> Davis has presented no evidence that he might be prejudiced by our acceptance of this appeal, ...

Of the same import is Cook v International Transportation Corp., 940 F2d 207, 211 (CA 7 1991) where it held that a defect in the Notice of Appeal could be overlooked if it:

> . . . did not mislead or prejudice the appellee.

Other circuits have held that designating the appellant parties in the plural is sufficient. The Second

Circuit, in Association of American Medical Colleges v Cuomo, 913 F2d 55 (1990), held:

> Notice of appeal indicating that 'the defendants in the above matter, hereby appeal' is the functional equivalent of naming each and every defendant and satisfied specificity requirements of Federal Appellate Rule 3 (c). (Headnote 1).

Cf. Cammack v Waihee, 932 F.2d 765 (CA 9 1991) and Galbraith v Cutter Biological, Inc., 931 F.2d 991 (CA 9, 1991).

When different panels of the same ciruit, within several months, used conflicting bases for consideration of jurisdiction and these differing bases find support in decisions in other circuits, there are evident problems of equal application, and thus, equal

protection, of the law. While there have been denials of certiorari to those seeking review of the type of application of the Federal Rules of Appellate Procedure made in the case at bar, when contrary determinations appear in the same circuit and are supported by a significant number of decisions in other circuits, there is a need for resolution. Without resolution, of necessity, there are those who are not receiving the protection of the law that is the equal of the protection others receive. In the Sixth Circuit, equal protection of the law can be considered a happenstance of panel assignment. What protection the law affords should never be determined by the happenstance of presiding judges.

RELIEF

WHEREFORE, Petitioner prays that a Writ of Certiorari directed to the United States Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michigan Carpenters Council
Health and Welfare Fund,
et al.
Plaintiffs,

Trustees for Michigan Carpenters Council Health and Welfare Fund,
Plaintiff-Appellant
(89-1412)

v. O R D E R

Charles J. Rogers Construction, A Michigan Corporation,
Defendant-Appellant
(89-1411)

Filed
Jun 14 1989

C. J. Rogers, Inc., a Michigan Corporation, et al.
Defendants.

Before: KENNEDY, JONES and WELLFORD,
Circuit Judges.

The defendant appeals (89-1411) and the plaintiff cross-appeals (89-1412) from the final judgment in favor of the plaintiffs. Both defendants and plaintiffs have filed motions to amend the captions in their respective appeals.

Rule 3(c), Fed. R. App. P.,

requires the notice of appeal to specify the party or parties taking the appeal. The use of "et al." in such a designation fails to provide such notice. Torres v Oakland Scavenger Company, 108 S.Ct. 2405 (1988); Ford v. Nicks, 866 F2d 865, 869, (6th Cir. 1989); Van Hoose v. Eidson, 450 F2d 746, 747 (6th Cir. 1971). This requirement is jurisdictional in nature and may not be waived. Torres, 108 S.Ct. at 2409. Further, we have no authority to amend a notice of appeal to add additional parties after the time for taking the appeal has expired. Rule 26(b), Fed. R. App. P.; See also Trinidad Corp. v Maru), 781 F2d 1360 (9th Cir. 1986) (per curiam); Cook and Sons Equipment, Inc. v Killen, 277 F2d 607 (9th Cir. 1960).

It therefore is ORDERED that the defendants' and plaintiffs' motions to amemd the caption are denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michigan Carpenters Council Health and Welfare Fund, et al.

Plaintiffs

Trustees for Michigan Carpenters Council Health and Welfare Fund,

FILED
Sep 27 1989

Plaintiff-Appellant
(89-1412)

v.

O R D E R

Charles J. Rogers Construction, a Michigan Corporation,

Defendant-Appellant

C.J. Rogers, Inc., a Michigan Corporation, et al.

Defendants.

Before: KENNEDY, JONES and WELLFORD, Circuit Judges.

The defendant appeals (89-1411) and the plaintiff cross-appeals (89-1412) from the final judgment in favor of the plaintiffs. We previously denied motions to amend the captions filed by both the defendant and the plaintiff. Both now move for reconsideration of

of that order. The motions to reconsider raise issues of the proper parties to the appeal under Torres v. Oakland Scavenger Company, 108 S.Ct. 2405 (1988) and other cases. On the defendant's motion, briefing was ordered to be held in abeyance pending a ruling on the motion to reconsider.

We note that this Court has ordered an en banc review in another appeal, Minority Employees of the, Tennessee Department of Employment Security, v. Tennessee, Case No. 88-5429, which involves a similar argument as that advanced by the parties in the instant motions. In view of the pending en banc review in Minority Employees, we grant both motions for reconsideration, but refer the determination of the merits of the motions to amend the caption to the panel assigned to determine this case upon the merits. It is therefore ORDERED that the parties address the motions to amend the caption and related

issues in their appellate briefs.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk.

INTERNATIONAL UNION, UAW; Local 217 International Union, UAW,

Plaintiffs-Appellees

v

UNITED SCREW & BOLT CORPORATION,

Defendant-Appellant.

No. 90-3972

Before MARTIN and MILBURN, Circuit Judges, and CONTIE, Senior Circuit Judge.

***

United Screw and Bolt Corporation filed a Notice of Appeal in this case on October 30, 1990. The Notices Caption sets forth:

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL WORKERS OF AMERICAL, UAW, et al.,

Plaintiffs,

vs.

UNITED SCREW AND BOLT CORP.,

Defendants.

The body of the Notice states:

> NOTICE IS HEREBY GIVEN that United Screw & Bolt Corporation,the defendant in the above captioned litigation ("Defendant"), hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Order of the U. S. District Court (Judge White) entered October 2, 1990 granting summary judgment for Plaintiff UAW in the above captioned matter.

Both the International union and Local 217 are parties to the agreement at issue; both were named plaintiffs in the district court proceedings. However, Local 217 is not mentioned in the Notice of Appeal. Because of this imprecise drafting and because of several opinions which refer to the requirement of naming

the appellant, we now turn to the issue of whether the appellee must be designated with the same precision.

> As with most decisions interpreting procedural rules, our most important task, after fidelity to any Supreme Court decisions bearing upon the question, is to provide the understandable and practical guide to the application of the federal rules so that litigants don't innocently frustrate their access to our courts.

Minority Employees v. Tennessee Dep't of Employment Security, 901 F.2d 1327,1328 (6th Cir. 1990). To help achieve this goal, we believe it is best to set forth in detail the rule and precedents which guide our analysis. Federal Rule of Appellate Procedure 3(c) states:

> (c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the

judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An Appeal shall not be dismissed for informality of form or title of the notice of appeal.

This seemingly benign rule has repeatedly created problems for parties on appeal. We believe this is partially caused by the Rule's recommended Form, which is:

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the __
District of _____

File _____

A.B., Plaintiff

v Notice of Appeal

C.D., Defendant

Notice is hereby given that C.D.,

dedendant above named, hereby appeals to the United States Court of Appeals for the ____ Circuit (from the final judgment) (from the order (describing it)) entered in this section on the ____ day of ____, 19___.

(S) _____

_____

(Address)

Attorney for C.D.

This simple form is sufficient for a notice of appeal when the action involves only two parties, but when three or more parties are involved the form is, at best, misleading. We cannot overemphasize the need for appellants in actions involving three or more parties to look beyond this form for guidance in drafting a notice of appeal. The Supreme Court decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) and our en banc decision in Minority Employees have created--as we have determined is necessary--

inflexible rules which are sure to trap the unwary and the uninstructed.

In Torres, the Supreme Court was confronted with the issue of whether the use of the term "et al.," used to represent a group of plaintiff-appellants, was specific enough to comply with the requirements of Rule 3(c). The Court ruled it was not; the purpose behind the specificity requirement of Rule 3(c) - to provide notice to the appellee and the court of the identity of the appellant or appellants - was not satisfied. Torres, 487 U.S. at 318.

In Minority Employees, this circuit was confronted with an analogous situation. The caption of the Notice of Appeal in Minority Employees, represented both defendants and plaintiffs with the term "et al." and the body of the notice referred to "Plaintiffs." An en banc court ruled jurisdiction over unnamed plaintiff-

appellants was barred, concluding that neither "et al." nor "plaintiffs" was sufficient to designate the appealing parties. Minority Employees, 901 F.2d 1330-1332. The court concluded that "unless a party is named in the notice of appeal, the appellate court does not have jurisdiction over him." Id. at 1334 (Order reported at 807 F.2d 178 (9th Cir.1986), cited by Torres, 108 S. Ct. at 2407; see Santos Martinez v. Soto-Santiago, 863 F.2d 174, 176 (10th Cir.1988) ("all plaintiffs appeal" is insufficient under Fed. R. App. P. 3(c); but see Adkins v United Mine Workers), No. 90 5379, slip op. at 7-11 (6th Cir. July 18, 1991) ("all of the plaintiffs" sufficient under Fed. R. App. P. 3(c) to confer jurisdiction over all of the plaintiffs who pursued the complaint in the district court to a final judgment even though the notice of appeal specifically listed one plaintiff by name).

In the caption to its Notice of Appeal, United Screw & Bolt places the name of International union, followed by "et al." In the Notice's body, Local 217 is not specifically mentioned anywhere in the Notice. In light of broad language used in Torres and Minority Employees, we must consider whether the Notice of Appeal filed by United Screw & Bolt serves to confer this court jurisdiction over the Local 217. Torres, 487 U.S. at 314 (The failure to name a party in a notice of appeal is more than excusable "informality."); Minority Employees, 901 F.2d at 1334 ([u]nless a party is named in the notice of appeal, the appellate court does not have jurisdiction over him," citing Order reported at 807 F.2d 178 (9th Cir. 1986). Because our holding in Minority Employees is not asymmetrical, applying only to the parties raising the appeal, we conclude that the Notice of Appeal filed by

United Screw & Bolt was sufficient to confer jurisdiction upon this court over Local 217.

The material fact which distinguishes this case from both Torres and Minority Employees is that in this case, United Screw & Bolt, the appellant, failed to specifically mention an appellee, Local 217, in its Notice of Appeal, whereas in both Torres and Minority Employees it was the party who was purportedly taking the appeal which was not named in the notice of appeal. At first blush, this might appear to be a distinction without a difference, however, on closer examination the importance of this distinction becomes readily apparent. Both Torres and Minority Employees purported to merely effectuate the express requirement of Fed. R. App. P. 3(c); significantly, Fed. R. App. P. 3(c) only requires, inter alia, that notice of appeal "specify the party or

parties taking the appeal. There is no mention of appellees; nor does the sample notice of appeal in the Forms Appendix mention naming the appellees. Instead, Rule 3(c) requires the notice of appeal to "designate the judgment, order or part thereof appealed from." United Screw & Bolt fulfilled this requirement by alluding to "the Order of the U. S. District Court (Judge White) entered October 2, 1990." Because Fed. R. App. P. 3(c) contains no requirement that the notice of appeal contain the manes of the appellees, we feel it unwise to engraft such a requirement to the otherwise explicit language of Rule 3(c).

Nor do we feel that the Torres or Minority Employees decisions compel an opposite conclusion. In both of these cases, the respective courts utilized the generic term "party or parties" in discussing the notice of appeal requirements. Although this term could

logically be interpreted to apply to both appellants and appellees, closer examination of these cases reveals that the term was utilized in the context of Rule 3(c), that is, the party or parties taking the appeal.

Furthermore, the results in Torres and Minority Employees were compelled by the need "to provide notice both to the opposition and to the court of the identity of the appellant or appellants." 487 U.S. at 318, 901 F.2d at 1333. This "notice" consideration does not carry equal force when applied to the identifying the appellees. Presumably, the appellees will be identified by the specific order or judgement the appealing party lists in its notice of appeal. Ordinarily, an appeal from a final judgment draws into question all prior non-final rulings and orders, Taylor v United States 848 F.2d 715, 717-18 (6th Cir. 1978) (quoting McLaurin v Fisher 768 F.2d 98, 101 (6th

Cir. 1985). However, if an appellant chooses to designate specific determinations in his notice of appeal, only those determinations may be raised on appeal. McLaurin, 768 F.2d at 102 (citing Drayton v Jiffee Chemical Corp., 591 F2d 352, 361 n. 10 (6th Cir. 1978)). It is the order or judgment from which the appellant apperals and not the specific mention of the appellees that provided the court and any opposing parties the necessary notice. For example, in this case United Screw & Bolt appealed the district court's order which granted summary judgment to both the International union and the Local 217. Notwithstanding United Screw's failure to specifically mention the Local 217 in its Notice of Appeal, both parties were put on notice that the entire judgment which determined the legal rights with respect to each other was being called into question. If for some reason the appellant wishes to only

appeal a certain portion of a judgment he can either explicitly limit his appeal to that issue by inserting the appropriate language in his notice of appeal or appeal the entire judgment and indicate to those parties who will be unaffected by the issues he intends to raise on appeal of that fact. See Chathas v Smith, 848 F.2d 93, 94 (7th Cir. 1988) (any confusion in appellees' minds can be relieved by a letter from appellants to the them).

United Screw & Bolt indicated in its Notice of Appeal that it intendedto appeal the "Order of the U.S. District Court (Judge White) entered October 2, 1990 granting summary judgment for Plaintiff UAW in the above captioned matter." Although this language is imprecise, we do not feel that this language precludes jurisdiction over both the International union and the Local 217 under Rule 3(c).